

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS C. CRAIG,)
) CASE NO. C12-0927-MJP-MAT
Plaintiff,)
)
v.) REPORT AND RECOMMENDATION
)
MICHAEL J. ASTRUE, Commissioner of)
Social Security,)
)
Defendant.)
_____)

Plaintiff appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied his application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED for further administrative proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1980. (Administrative Record (“AR”) 130.) He has a high school education and previously worked as a truck driver, a customer service representative,

01 and a bellman/limousine driver. (AR 161, 184.) In October 2008, he filed an application for
02 DIB, alleging disability beginning August 18, 2007. (AR 16, 130.) He subsequently
03 amended the alleged onset date to May 1, 2008. (AR 16, 30.)

04 The Commissioner denied plaintiff's application initially and on reconsideration.
05 (AR 83-84, 86-87, 88-90.) He requested a hearing which took place on May 4, 2010. (AR
06 26-80, 95.) On June 15, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR
07 16-22.) The Appeals Council denied plaintiff's request for review (AR 1-4), making the
08 ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. §
09 405(g). On May 30, 2012, plaintiff timely filed the present action challenging the
10 Commissioner's decision. (Dkt. No. 1.)

11 II. JURISDICTION

12 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
13 405(g) and 1383(c)(3).

14 III. DISCUSSION

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. § 416.920. At step one, it must be determined
17 whether the claimant has engaged in substantial gainful activity. The ALJ found plaintiff had
18 not engaged in substantial gainful activity since May 1, 2008, the alleged onset date. (AR 18.)
19 At step two, it must be determined whether the claimant suffers from a severe impairment.
20 The ALJ found plaintiff's psoriasis and ankylosing spondylitis severe. *Id.* Step three asks
21 whether the claimant's impairments meet or equal the criteria of a listed impairment. The
22 ALJ found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

AR 19. If the claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity ("RFC") and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform

less than a full range of sedentary work as defined in 20 CFR 404.1567(a). The claimant can frequently lift and/or carry less than ten pounds. The claimant can stand and/or walk for less than two hours in an eight hour workday with normal breaks. The claimant can sit for at least six hours in an eight hour workday. He must be allowed to periodically alternate between sitting and standing. The claimant is precluded from climbing, balancing, kneeling, crouching, crawling, and stooping. The claimant can occasionally reach. The claimant is limited with exposure to temperature extremes, exposure to humidity, and operation of hazardous equipment and machinery.

Id. With that assessment, the ALJ found plaintiff able to perform his past relevant work as a customer service representative and, therefore, to be not disabled. (AR 22.)

Plaintiff argues substantial evidence does not support a finding that he could perform his past relevant work as actually performed, the ALJ's residual functional capacity assessment is unreviewable, the ALJ did not comply with Social Security Ruling ("SSR") 00-4p, and substantial evidence does not support a finding that he could perform his past relevant work as generally performed. (Dkt. No. 15 at 1.) He requests remand for further administrative proceedings. *Id.* at 2. The Commissioner argues the ALJ's decision is supported by substantial evidence and should be affirmed. (Dkt. No. 16.)

Residual Functional Capacity Assessment

At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and assess his work-related abilities on a function-by-function basis, including a required narrative discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can

01 do considering his limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the
02 limiting effects of all of plaintiff's impairments, including those that are not severe, in
03 determining his RFC. 20 C.F.R. §§ 404.1545(e), 416.945(e); SSR 96-8p.

04 In assessing plaintiff's RFC, the ALJ found plaintiff able to "stand and/or walk for less
05 than two hours in an eight hour workday with normal breaks" and "sit for at least six hours in
06 an eight hour workday." (AR 19, emphasis added.) Plaintiff argues this RFC was legally
07 insufficient in that the ALJ failed to determine how long plaintiff could stand and/or walk. In
08 addition, plaintiff argues that by specifying plaintiff could sit for at least six hours, the ALJ
09 failed to determine the maximum amount of time that plaintiff could sit.

10 Responding, the Commissioner disputes plaintiff's contention that the ALJ failed to
11 determine how long plaintiff could sit, stand and/or walk. The Commissioner contends the
12 ALJ relied upon the findings of Shaila Gala, M.D., who opined that plaintiff could stand and/or
13 walk less than two hours in an eight-hour workday. (AR 388.) The Commissioner argues
14 that "it is reasonable to infer, based upon the ALJ's assessment of the medical evidence, which
15 has not been challenged, that the ALJ assessed Plaintiff's residual functional capacity as the
16 most he could do." (Dkt. No. 16 at 4-5.)

17 Contrary to the Commissioner's contention, the ALJ's decision does not provide any
18 findings about plaintiff's ability to sit, stand, and/or walk. Because the ALJ only specified
19 that plaintiff could stand and/or walk for less than two hours, it is unknown whether the ALJ
20 found plaintiff could stand and/or walk for fifteen minutes, thirty minutes, one hour, etc.
21 Further, in only identifying the least amount of time plaintiff could sit, the ALJ failed to
22 specify the maximum amount of time plaintiff could sit. This is significant because the

01 vocational expert testified that a person would have to sit seven hours and twenty minutes per
02 day to work as a customer service representative. (AR 73-77.) As the ALJ specified the
03 *least* plaintiff could do rather than the *most* plaintiff could do in terms of sitting, standing, and
04 walking as required by SSR 96-8p, the ALJ's RFC finding is ambiguous and unreviewable, in
05 part.

06 Plaintiff also faults the ALJ for failing to specify the frequency of plaintiff's need to
07 alternate sitting and standing in the RFC finding. The ALJ found that plaintiff "must be
08 allowed to periodically alternate between sitting and standing." (AR 19.) Plaintiff avers that
09 because the ALJ failed to determine how long plaintiff could sit without interruption, the ALJ
10 failed to render a sufficiently specific assessment of his need to alternate sitting and standing.
11 *See* SSR 96-9p ("The RFC assessment must be specific as to the frequency of the individual's
12 need to alternate sitting and standing.").

13 In response, the Commissioner argues that the ALJ based her assessment on the
14 opinion of Dr. Gala, who indicated plaintiff had no difficulty sitting but would need to
15 periodically alternate between sitting and standing to relieve pain and discomfort. According
16 to the Commissioner, the ALJ ruled that plaintiff needed an "at-will" sit/stand option because
17 only plaintiff could know when he was experiencing pain requiring a change in position.

18 Although the Commissioner contends that the ALJ implicitly adopted an "at-will"
19 sit/stand option in this case, there is no mention of this in the ALJ's decision. To the contrary,
20 the ALJ simply noted that plaintiff must periodically alternate between sitting and standing
21 with no indication of when or how often he needed to change positions. As the ALJ failed to
22 specify the frequency of plaintiff's need to alternate sitting and standing as required by SSR

01 96-8p in the RFC assessment, the ALJ erred.

02 Furthermore, the Court cannot conclude the ALJ's error was harmless. Even if the
03 ALJ intended the sit/stand option to indicate a need to change positions "at-will," the ALJ
04 failed to pose a hypothetical question to the vocational expert which reflected an at-will
05 sit/stand option. In posing a hypothetical to the vocational expert, the ALJ asked whether a
06 person could perform plaintiff's past work as a customer service representative if the person
07 "must periodically alternate sitting and standing." (AR 72.) In response to the ALJ's
08 hypothetical, the vocational expert testified that a person could perform plaintiff's past work as
09 a customer service representative "provided that if the need to alternate sitting and standing
10 was satisfied by doing so . . . less than five minutes out of an hour." (AR 73.) The ALJ
11 concluded, based on the vocational expert's testimony, that plaintiff could perform his past
12 relevant work as a customer service representative. (AR at 22.) However, the hypothetical
13 upon which the ALJ relied actually restricted the alteration of positions to less than five
14 minutes an hour, not at-will. *See id.*

15 Plaintiff also points out that although the ALJ stated that the vocational expert testified
16 that plaintiff could perform his past relevant work as a customer service representative with his
17 "current residual functional capacity," the ALJ misstated the vocational expert's testimony.
18 (AR at 22.) Rather, as indicated above, the vocational expert testified that a person could
19 perform plaintiff's past work as a customer service representative as long as he only needed to
20 alternate sitting and standing for "less than five minutes out of an hour." (AR 73.) As the
21 ALJ's RFC assessment did not define how long plaintiff needed to maintain either position, the
22 ALJ's statement is not supported by the record.

01 Because of the ALJ's ambiguous framing of the sit/stand option, the hypothetical
 02 question, and the responses of the vocational expert, the ALJ had no evidence upon which to
 03 base her finding that plaintiff could perform the job of customer service representative.
 04 Therefore, on remand, the ALJ should clarify her meaning as to the sit/stand option both within
 05 her RFC assessment and any hypotheticals to the vocational expert.

06 Step Four

07 Plaintiff argues that substantial evidence does not support the ALJ's step four finding
 08 that he could perform his past relevant work as a customer service representative as generally
 09 performed.¹ (Dkt. No. 15 at 8-15.) Plaintiff further contends that the vocational expert's
 10 testimony conflicts with the Dictionary of Occupational Titles ("DOT") and that the ALJ did
 11 not reconcile the conflict as required by SSR 00-4p. The Commissioner responds that the
 12 ALJ did not err by finding that plaintiff was able to perform his past work as generally
 13 performed in the national economy. (Dkt. No. 16 at 6.)

14 The Court need not determine whether the ALJ erred at step four because this case is
 15 being remanded for further proceedings. If the ALJ considers testimony from a vocational
 16 expert on remand, however, the ALJ is directed to make an appropriate inquiry in accordance
 17 with SSR 00-4p to determine whether the testimony conflicts with the DOT. If it does, the
 18 ALJ must obtain a reasonable explanation for the conflict before relying on that testimony at
 19 step four. *See Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007).²

21 1 The parties agree that the ALJ did not render an as actually performed step four finding. (Dkt. No. 15
 22 at 5, Dkt. No. 16 at 3, Dkt. No. 17 at 1.)

2 "SSR 00-4p unambiguously provides that '[w]hen a [vocational expert] ... provides evidence about the
 requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible

IV. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED for further administrative proceedings not inconsistent with the Court's instructions. A proposed order accompanies this Report and Recommendation.

DATED this 9th day of January, 2013.



Mary Alice Theiler
United States Magistrate Judge

conflict between that [vocational expert] ... evidence and information provided in the [Dictionary of Occupational Titles].’ SSR 00-4p further provides that the adjudicator ‘will ask’ the vocational expert ‘if the evidence he or she has provided’ is consistent with the Dictionary of Occupational Titles and obtain a reasonable explanation for any apparent conflict.” *Id.* at 1152-53.